Office Supreme Court, U.S.
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted].

FRANK BASSI,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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New York, New York,
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TABLE OF CONTENTS

	PAGE
Petition	1
A. Jurisdiction	1
B. Question Presented	2
C. Constitutional Provisions and Statutes	2
D. Summary Statement	2
E. Reason for Granting the Writ	2
George McDonnell—Cross Examination	3
Frank Bassi—Direct Examination	7
Frank Bassi—Cross Examination	10
Conclusion	14
Appendix A—Opinion of the United States Court of Appeals	15
Order Denying Petition for Rehearing	17
Appendix B	18
Constitutional Provision	18
Statutes Involved	18

Authorities Cited

Butts v. U. S., 273 F. 2d 35	12
Newman v. U. S., 299 F. 2d 813	12
Sherman v. United States, 356 U. S. 370	13
Sorrels v. United States, 287 U. S. 435	12, 13

STATUTES

United States Code PAGE

Title 21 Sec. 173 2

174 2

Title 28 Sec. 1254(1) 1

RULES OF THE UNITED STATES

Rule 19 1

UNITED STATES CONSTITUTION

Amendment 2

MISCELLANEOUS

73, Harvard Law Review, 1333 14

IN THE

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No. .....

FRANK BASSI,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associates Justices of the Supreme Court of the United States:

The petitioner, Frank Bassi, prays that a Writ of Certiorari issue to review:

A. Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on April 1964 and the denial of the petition for a re-hearing was duly docketed on May 4, 1964. The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28 United States Code, Section 1254 (1) on the ground that review by the Supreme Court by a writ of certiorari is sought of a judgment of affirmance by the United States Court of Appeals for the Second Circuit.

B. Question Presented

Does not the defense of entrapment render a defendant not guilty where the planned creative activity is launched by Federal officers who by repeated inducements to a defendant lead to the commission of a crime and where pre-disposition is barren or highly inconclusive.

C. The Constitutional Provisions and Statutes Involved Are:

1. United States Constitution, Amendment V.

2. United States Code, Title 21, Sections 173 and 174.

All of the foregoing are set forth in full in Appendix B, annexed to this petition.

D. Summary Statement

A two count indictment was returned against the petitioner charging two substantive violations to violate Title 21, United States Code, Sections 173 and 174. The petitioner was found guilty in a non-jury trial on two counts and sentenced to ten years which he is now serving.

E. Reason for Granting the Writ

The petitioner sustained his defense of entrapment in all respects and the prosecution failed in its burden of proof to show the accused was ready and willing without persuasion.

There were three separate occasions in which the informer, Greene, a former jail-mate of Frank Bassi came first to the place of employment of Frank Bassi, then to the home of Frank Bassi's mother as well as to Frank

Bassi's employment again designed to entrap Frank Bassi who is engaged in his daily occupation as a barber, said program being set up in advance.

The meeting of the Federal agents and the presence of the informer Greene with the agents as well as the fact that agent McDonnell admittedly spent quite some time in the home of the informer, Greene, at 149th Street and Eighth Avenue, prior to Greene approaching Bassi confirms entrapment in all respects in in the *Sorrell* case.

GEORGE McDONNELL—Cross Examination.

(45) Q. Had you had any discussion before you arrived at 125th Street and the West Side Drive with Agents Ferro and Mendelsohn? A. Had we had discussions? Yes, we had.

Q. Where was that, at your office? A. At the office.

Q. Had you agreed to meet at 7:30 p. m.? A. That's correct, sir.

Q. You drove up alone? A. I did.

Q. Had you been told that Greene would be there? A. Not that I recall by name. I had been told that we'll meet with the informant at 125th and the West Side Highway at 7:30.

Q. Had you been told that an informer would be there to meet with you at that time? A. Yes, yes.

Q. So that the presence of Greene did not surprise you when you found him there, is that right? A. It did not.

Q. And they drove up in their own car. Well, when I say their own car I mean the government car. A. The car assigned to them, yes.

Q. Yes. And you drove up in your car? (46) A. Yes.

Q. And then the four of you had a discussion? A. That's correct, sir.

Q. And was the name Frank Bassi mentioned at that discussion? A. Yes, it was, sir.

Q. Do you remember who brought up the name Frank Bassi? A. I don't recall just which one of the three gentle-

men brought the name up first, but the name was mentioned.

Q. Was the name Frank Bassi mentioned between you and your two fellow agents before you met at 7:30 on July 12th? A. Had the name Bassi been mentioned?

Q. Yes. A. Yes.

Q. Either Ferro or Mendelsohn or both told you at some time prior to 7:30 on July 12th about the investigation that you were to continue or started to do with a Frank Bassi? A. Correct, sir.

Q. And they told you, didn't they, that Frank Bassi was the one who had been contacted by the informer, (47) Claude Greene. A. No; I wouldn't say that they said that. They did say, in substance, that this investigation concerns Frank Bassi.

Q. Is that the first time that you heard Frank Bassi's name mentioned? A. I don't know if that is the first time I heard the name mentioned. You mean mentioned in the office or mentioned any place, the first time I heard the name Frank Bassi mentioned?

Q. Well, it is the first time, at any rate, that you had anything to do with the Frank Bassi case? A. That's correct, sir.

Q. And where is Greene now? A. I think he is available. I don't know exactly where he is physically now.

Q. Well, do you know where he lives— A. I believe he is—I think he is in jail now.

Q. Where? A. At the New York City Prison.

Q. Where? A. New York City Prison, Tombs.

Q. Do you know why he is in jail? (48) A. I do not.

Q. Have you talked with him? A. I have not.

Q. To your knowledge has any one of your fellow agents talked to him? A. Not to my knowledge.

Q. Is he an addict? A. Of my own knowledge I don't know, sir.

Q. Well now, you have been an agent for 14 years. A. Yes.

Q. You can tell an addict when you see one, don't you? A. Some of them you can, yes.

Q. Aren't there certain physical characteristics common to all addicts? A. Not to all addicts; to some addicts, there are certain characteristics that are common to some addicts. In other words there are many, many addicts that you can't tell physically from their physical appearance that they are addicts.

Q. Well, could you tell me from— A. You would have to be in his presence for long, long periods of time.

Q. Could you tell from Greene's physical (49) appearance whether or not he was an addict at the time that you first met him? A. I would say at the time that I first met him, that is July 12th, that he was not using narcotics. There came a time later when I perhaps would have had doubts about it.

Q. Had your fellow agents told you that the informer was a drug addict? A. No, they had not.

Q. And you say that there were no physical characteristics evident on Greene on July 12th that led you to believe that he was an addict? A. Not on July 12th, sir.

Q. Pardon? A. Not on July 12th, sir.

Q. No. These physical characteristics take time in developing, don't they? A. They do.

Q. And you say that there came a time later on when these physical characteristics did develop and you became satisfied that he was an addict? A. No, I said that there came a time when I may have had my doubts. I have never seen him use narcotics. However, toward the latter part of this (50) investigation I did observe his hands, the joints, the swelling in his joints, which need not necessarily come from use of narcotics, but that is prevalent in most cases.

Q. You spent quite a bit of time in his home, didn't you? A. I did.

Q. He spent quite a bit of time in your home. A. He did not. He has never been in my house, sir.

Q. Never been to your house? A. He has not.

Q. But you were at his house? A. Yes.

Q. Where was that?

Mr. Jacobs: Objection, your Honor.

Mr. Todarelli: I am talking now, your Honor, about July 12th.

The Court: I think I will let the agent answer that.

Where was his house?

The Witness: I don't know the exact address. It is at 149th and Eighth Avenue in Manhattan. It is the second large apartment house on the downtown side of 149th Street.

(51) Q. At any rate after you had had a conference with Mr. Mendelsohn, Mr. Ferro and Greene you and Greene left in your car? A. Yes, sir.

Q. And went to 124st and Madison Avenue? A. 123rd and Madison Avenue, sir.

Q. Did you have a conversation with Greene at 125th Street and West Side Drive? A. Yes.

Q. Before you started out in your car? A. Before we started out and en route to 123rd Street.

Q. And what was said? A. Well, in substance, who I was supposed to be, the part that I was playing, and what he would say and what I would say.

Q. Excuse me. I would like to have you, instead of substance, could you tell me what was said by whom to whom? A. Well, I can't recall the conversation verbatim but—

Q. I don't want the exact conversation but I want to know who said what to whom, in substance. A. Yes. Well, he said—well, I said, "I'll use the name Sonny."

(52) He said, "The guy's rather sharp, so you got to be on your Ps and Qs. He may ask you questions. You and I were in jail together."

Q. Pardon? A. He says, "You and I were in jail together," meaning Claude Greene and myself were in jail.

Q. Meaning that you were to give Bassi the impression that you and the informer had been in jail together? A. Right.

Q. Did he tell you that he had been in jail with the defendant? A. Yes.

Q. Did he tell you where? A. I don't recall that he did. He may have, but if so I didn't make any mental note of it. He probably mentioned it, but I don't believe so.

Q. Did he tell you that the defendant had been convicted for the sale of narcotics in 1957? A. Did he tell me that?

Q. Yes. A. That wasn't necessary. I knew that. But he didn't tell me that.

Mr. Jacobs: I object.

* * * * * *

The Witness: On 112th Street between First and Second.

FRANK BASSI—DIRECT EXAMINATION.

(145) Q. After your release from Lewisburg on April 3rd, 1961, did you see Boomie? A. Yes, I did.

Q. Are you able to fix the time when you first saw him after your release from jail? A. It was around June.

Q. Of what year? A. '62.

Q. Where were you working at the time? A. At my father-in-law's barber shop.

Q. Now, where and when, time of the day, did you meet Boomie? A. Well, I met him 117th Street at First Avenue, and I was coming from the barber shop, which I just had finished work; it was about 4:30, 5 o'clock, and I was passing, and I heard somebody call my name, and I turned around to see who it was, and it was Boomie, and he came over and asked me, you know, "How are you?" and "How are you doing? What are you doing?" You know, I told him I was working in the barber shop, and that I was waiting to go back on construction and, well, he

turned around, he asked me, he says, "Could you (146) do anything for me? Could you get me any stuff?"

And I told him, "No, I can't." I said, "I'm not fooling around in that no more. I don't want to know nothing about it no more." And with that I says, "I'll see you: good-bye"; and I walked away.

Q. Did you see him after that conversation? A. I seen him a couple of days later, he was standing in front of my mother's house.

Q. Where were you before you saw him? A. Well, I was up in my mother's house.

Q. Visiting your mother? A. Yes.

Q. And when you came downstairs you saw him, Boomie, there? A. Yes.

Q. Did you have a conversation with him? A. Yes, I did. Once again he tried to talk me into going back into the —you know, trying to get him something. So I told him, "No," you know, "I can't do nothing for you." And I told him, "Leave me alone," you know, "don't bother with me," and I walked away from him again.

Q. Did you see Boomie after that? A. A couple of days later again I seen him. He (147) was standing in front of my barber shop.

Q. Did you talk with him on that occasion? A. Well, no. I see him, but he didn't see me, and when I came out of the shop, across the street there is a bus stop. Well, there was a bus standing there: I ran across and got on the bus and I avoided him altogether.

Q. Were you trying to avoid him? A. Yes, I was.

Mr. Jacobs: Objection, your Honor.

The Court: I will let him answer.

Q. On what side of First Avenue is your father-in-law's barber shop? A. On the west side.

Q. And on what side of the street is there a bus stop there? A. That east side.

Q. And you ran from the west side of the street to the east side of the street to catch a bus? A. Yes.

Q. After this did you again see Boomie? A. Yes, I did.

Q. And when was that? A. That same location, in front of the barber (148) shop.

Q. Can you fix the date a little better for us, Mr. Bassi, and let me remind you that the evidence here is that on July the 14th you delivered narcotics. You don't deny that, do you? A. No.

Q. Now, with reference to July 14th can you tell us about how many days before July 14th you saw Boomie near your father-in-law's barber shop? A. I would say about three or four days.

Q. All right. Now, did you talk with him on that occasion? A. Yes, I did.

Q. Will you tell us what happened, please? A. Well, he once again waited for me to come out of the shop, and he stepped in front of me, and he told me, he says, "I got $4,500," he says, "can't you get me anything," he says, "anything better than what I'm getting?" he says, you know.

He says, "Just this once."

So I says, "I don't know." I says, "I'll have to think about it." And, you know, I was undecided. So I says, "Well, I'll give you a call." I says, "Give me a number and I'll give you a call tomorrow night (149) between seven and eight."

Q. And did you call him? A. Yes, I did.

Q. And what took place? By the way, excuse me for interrupting, and withdraw the last question, please. Do you remember the telephone number that Boomie gave you? A. No.

Q. But when you called on the telephone was it the number that he had given you? A. Yes.

Q. And did you talk with Boomie on the telephone? A. Yes.

Q. What was the next evening after this meeting near the barber shop, is that right? A. Yes.

Q. Now, tell us what was said over the telephone. A. Well, I had told him to meet me at 123rd Street between Park and Madison.

Q. Well you say you told him. Do you mean that you had told him before this telephone call or this telephone call? A. The telephone call.

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FRANK BASSI—CROSS EXAMINATION

(180) Q. What did he say? Did he tell you how much he wanted? A. No.

Q. Did he tell you how much he was willing to pay? A. No.

Q. Did he tell you what kind of stuff he was looking for, good stuff, bad stuff? A. He didn't mention nothing about stuff. He just mentioned stuff in general.

Q. You got out of jail in April of 1961, so that this was about 14 months after you got out of jail. You had never seen Boomie in this area before? A. Before?

Q. Before the June meeting, the first June meeting. A. No.

Q. Do you know where he was living at that time? A. No.

Q. What did you tell Boomie on this second occasion? A. Well, I told him to "Leave me alone and don't bother me; forget you even know me."

Q. And what did he say? A. Well, he, you know, he was stunned, and I walked (181) away from him, that's all.

Q. And he didn't say anything? You just walked away and he stood there? A. Yes.

Q. Did you ever tell Boomie where your mother lived? A. No.

Q. Where was your mother living at that time? A. 112th Street between First and Second.

Q. What address? A. I'm not too sure. I think it's 430 —no, it can't be. It was 334 or something like that.

Q. Do you know what the telephone number was there? A. My mother's number?

Q. Yes. A. Yes, sir.

Q. What was it? A. Filmore 8-2301.

Q. Did you ever give that telephone number to Boomie? A. No.

Q. You never gave it to him? A. No.

In the instant case it is clear beyond all doubt that Greene was sent out by Federal agents to set up Bassi and criminal design did originate in the minds of government agents and the defense is available not in the view that the accused though guilty may go free but that the government cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct. Further the burden is on the government to prove beyond a reasonable doubt that the inducement was not the cause or creator of the crime or to prove beyond a reasonable doubt that the accused was ready and willing to commit the offense charged, whenever the opportunity offered.

The government failed to show that the accused was ready and willing without persuasion. The evidence is completely opposite and Greene was not used in rebuttal so that it is conceded. Bassi was an unwilling subject induced by an alleged friend.

The government did not prove a sufficient excuse for the inducement by way of reply.

Entrapment as a matter of law was established from the government's evidence that defendant secured narcotics only after repeated persuasions following meeting of informer and defendant on the fourth occasion at the barber shop where Bassi worked.

That the defendant was an unwilling subject and repeated persistency had to be used was a burden of proof which the defense met without rebuttal and proven in direct and cross examination.

The defense of entrapment comes in under a plea of not guilty. In *Sorrels* v. *U. S.* (287 U. S. 435, 77 L. ed. 413, 53 S. Ct. 210) the government contended it had to be pleaded in bar. The court through Chief Justice Hughes said this was a misconception, that "The defense is available, not in the view that the accused though guilty may go free, but that the Government cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct. The Federal courts in sustaining the defense in such circumstances have proceeded in the view that the defendant is not guilty. The practice of requiring a plea in bar has not obtained. Fundamentally, the question is whether the defense, if the facts bear it out, takes the case out of the purview of the statute because it cannot be supposed that the Congress intended that the letter of its enactment should be used to support such a gross perversion of its purpose."

The court quoted with approval the *dicta* of the rule given in *Newman* v. *U. S.* (299 F. 128, 131): "It is well settled that decoys may be used to entrap criminals, and to present opportunity to one intending or willing to commit crime. But decoys are not permissible to entice the innocent and law abiding into the commission of crime. When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor." And similar language in *Butts* v. *U. S.* (273 F. 35, 38): "The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is inconscionable, contrary to public policy, and to the estab-

lished law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it." (*Sherman* v. *U. S.*, 356 U. S. 370.)

In *Sorrells* v. *United States*, 287 U. S. 435 at 439, the government agent, as in the case at bar, asked the defendant on three separate occasions for liquor (Prohibition era) and each time the defendant said "No". The agent as in the instant case induced the defendant by saying that he was an ex-service man and former member of the same division. In the case at bar Greene *induced* Bassi because years previous they had been confined together at a Federal penitentiary. *Sorrells* v. *United States*, 287 U. S. 435 at page 441:

> "It is clear that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it but was an industrious law abiding citizen, and that the agent lured defendant otherwise innocent, to its commission by repeated and persistent solicitations in which he succeeded by taking advantage of the sentiment aroused by reminiscence of their experiences as companions in arms in the World War. Such a gross abuse of authority given for the purpose of detecting and punishing crime, and not for the making of criminals deserves the severest condemnation.

The Prosecution failed to show in the case of Frank Bassi a course of criminal activity similar to the crime which he performed at the invitation of Law Enforcement officers nor was evidence adduced that the defendant was engaged in unpunished activity which had to be detected and ended by the particular inducement.

The similar course of criminal activity was not established here by a fair preponderance of the evidence and in fact no evidence was presented by the Prosecution of unpunished criminal activity or prior course of criminal activity.

See: Harvard Law Review, Volume 73, Page 1333.

CONCLUSION

For the reasons hereinabove set forth this petition for a writ of certiorari should be granted.

Respectfully submitted.

James J. Hanrahan,
Attorney for Petitioner,
250 West 57th Street,
New York City.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 417—September Term, 1963.

(Argued April 14, 1964 Decided April 14, 1964.)

Docket No. 28728

UNITED STATES OF AMERICA,

Appellee;

v.

FRANK BASSI,

Defendant-Appellant.

Before:

WATERMAN, FRIENDLY and HAYS,

Circuit Judges.

Appellant seeks reversal of his conviction below, for violations of 21 U.S.C. §§ 173 and 174, United States District Court for the Southern District of New York, Bonsal, *J.*, sitting without a jury. Conviction affirmed.

ROBERT M. MORGENTHAU, United States Attorney (Howard L. Jacobs, Jack D. Samuels, Asst. United States Attorneys, of counsel), *for Appellee*.

JAMES J. HANRAHAN, New York City, *for Defendant-Appellant*.

Appendix A

PER CURIAM:

Appellant, who had previously been convicted of having violated the narcotic laws, appeals from his conviction below on an indictment alleging two violations of Title 21 U.S.C. §§ 173 and 174, and from the mandatorily imposed sentence of 10 years on each of the two counts, the sentences to run concurrently. At his trial before a judge sitting without a jury he asserted the affirmative defense that he, an unwilling seller, had been entrapped into the two sales of heroin, one for $4100 and one for $1000, that the Government proved he made.

On all the evidence the trial judge held that the affirmative defense was not proven, as result we find to have been properly reached, and as there is no merit in appellant's other contentions, we affirm the conviction in open court.

Appendix A

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourth day of May, one thousand nine hundred and sixty-four.

Present: HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
HON. PAUL R. HAYS,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANK BASSI,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

APPENDIX B

Constitutional Provision

AMENDMENT 5, UNITED STATES CONSTITUTION.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or in indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statutes Involved

Title 21, United States Code.

"173 IMPORTATION OF NARCOTIC DRUGS PROHIBITED; EXCEPTIONS; CRUDE OPIUM FOR MANUFACTURE OF HEROIN; FORFEITURES.

It is unlawful to import or bring any narcotic drugs into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium or coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Appendix B—Statute Involved

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government, without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug, be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision shall be placed in the custody of the board and in its discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes (Feb. 9, 1909, c. 100, 2, 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657)."

"174. SAME; PENALTY; EVIDENCE.

Whoever, fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the trasportation, concealment, or sale of any such narcotic drug after being imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned, not less than five or more than

twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

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No. 156

In the Supreme Court of the United States

OCTOBER TERM, 1964

FRANK BASKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
HERBERT J. MILLER, JR.,
Assistant Attorney General,
BEATRICE ROSENBERG,
BERNICE D. HAYDAGE,
Attorneys,
Department of Justice, Washington, D.C., 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 456

FRANK BASSI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Having waived trial by jury, petitioner was convicted after a non-jury trial in the Southern District of New York of having sold narcotics on July 11, 1962, and on April 29, 1963. He was sentenced as a second offender to concurrent terms of ten years' imprisonment. (R. I. 4-6, 8-9.) The conviction was affirmed on April 14, 1964. (R. II. 16.) A petition for rehearing was denied on May 4, 1964. (Pet. App. 17, R. II. 20-26.) The petition for a writ of certiorari was filed on June 5, 1964, and it is out of time under Rule 22-2 of the Rules of this Court.

In any event, the petition is without merit. The sole issue raised is whether the court, which was sitting as trier of the facts, was justified in rejecting

(1)

petitioner's deposition testimony. The evidence may be summarized as follows.

Government agent McDonnell testified that on the evening of July 12, 1962, he was introduced to petitioner by an informant named Greene, and that he told petitioner that he wanted to obtain a quarter kilo of heroin. Petitioner said it would cost $1,700. McDonnell gave $100 to petitioner, who directed McDonnell and Greene to wait at Greene's house for a telephone call. Petitioner gave his telephone number to Greene and, at McDonnell's suggestion, Greene gave McDonnell's number to petitioner. R. 11, 4-5. Petitioner later telephoned agent McDonnell and Greene and told them that he had encountered difficulty in obtaining the "stuff" but that he did have some "other good stuff" for which the price would be $1,000 instead of $1,700. Petitioner then instructed for Greene to come to petitioner's car. Upon returning from petitioner's car, Greene gave McDonnell a package of heroin. R. 11, 7. On July 18 and 19, 1962, after receiving telephone calls from petitioner, McDonnell met with petitioner and paid him some of the purchase price. R. 11, 6-7. On July 23, after another telephone call from petitioner, McDonnell paid petitioner another $400. Petitioner then advised McDonnell that a "panic" shortage of narcotics was anticipated and urged McDonnell to buy another package. R. 11, 6-7. After receiving another telephone call from petitioner, McDonnell paid him the balance due on the original purchase. R. 11, 8.

Between August 1, 1962, and the middle of April 1963, petitioner telephoned McDonnell approximately

nine times, asking on each occasion if he was ready for another package. McDonnell replied that he was not (R. II, 8, 9, 10, 11).

On April 24, 1963, McDonnell and Greene met with petitioner, and McDonnell said that he had $1,000 and wanted another package. Petitioner replied that he could not obtain another quarter kilo, but that he could deliver four ounces of "something good" for $1,200. Petitioner then left and returned shortly thereafter, announcing that he had missed his "connection" and returning the $1,000 (R. II, 11–12). On the following day, petitioner telephoned McDonnell at Greene's home and arranged a meeting during which McDonnell entered petitioner's car and gave him $1,000 (R. II, 12-13). On April 26, at 9:30 p.m., petitioner telephoned McDonnell and informed him that the package of narcotics could be picked up in the telephone booth of a specified drugstore. McDonnell found the package there (R. II, 14).

On cross-examination McDonnell testified that he spent "quite a bit of time" in the home of Greene, the informant (R. I, 11-12). McDonnell had agreed with Greene that in dealing with petitioner they would attempt to convey the impression that they had been in jail together (R. I, 12-13).

Petitioner testified in his own behalf that he was released from the penitentiary at Lewisburg on April 3, 1961 (R. I, 13). He asserted that in June 1962 Greene had asked him if he could get Greene any "stuff," and that petitioner had replied, "No, I can't. I'm not fooling around in that no more" (R. I, 13-14).

A few days later, Greene made a similar request of petitioner, who again refused (R. I, 14, 17). Three or four days before July 14, 1962 (the date of the first sale), Greene told petitioner he had $4,500 and asked whether petitioner could get him "anything better" than the narcotics Greene had been buying. Petitioner then agreed and arranged the meeting for the narcotics sale with which he was charged (R. I, 15–16).

Greene was available as a witness but was not called by either side.

The court was clearly free to disbelieve petitioner's testimony that the sales were made only after Greene had persistently importuned petitioner. The substantial amounts involved and the attempts by petitioner to induce McDonnell to buy more narcotics indicated that petitioner was in the narcotics business. The entrapment issue was properly resolved against petitioner by the trier of fact. See *Masciale* v. *United States*, 356 U.S. 386; *Lopez* v. *United States*, 373 U.S. 427.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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